

Vet. App. No. 15-3191

<sup>1</sup> Appellant's counsel conceded at oral argument that the notice of disagreement filed by Mr. Moberly's representative in July 2012 was timely, due to the effects of the Secretary's notice error. See September 28, 2016, oral argument, at 4:49-5:25. Without indulging the contentions asserted in her supplemental brief, the Secretary notes that Appellant repeats this concession therein. (Appellant's Proposed Supplemental Brief, at 3).

Initially, Appellant's stated basis for the necessity of additional briefing rings hollow. The nature, scope, and finality of the Secretary's May 2012 fee decision, together with the procedural defects that occurred in both Appellant's and Mr. Moberly's efforts to seek review of the issues decided in that decision, lie at the heart of the instant appeal. As such, those issues have been the subject of extensive briefing, as well as lengthy discussion at oral argument, by the parties. At argument, the parties were all prepared and had a firm grasp of the issues and provided thorough answers to the Court's inquiries. Nothing in the Court's inquiries or discussion betrayed that its understanding of the nature and substance of the issues was anything but complete. Consistent with its firm grasp of the issues, the Court did not identify a need for or request any additional post-argument discussion by the parties. Absent any indication by the Court that additional briefing is necessary, none should be accepted at this late hour.

A subtext is also apparent here, lying beneath the stated basis for Appellant's motion, which further mandates its denial. Appellant urges that an additional briefing period, along with the obvious and needless delay that it will create, is appropriate here, because there is no longer any need for the proceedings to proceed expeditiously. (Appellant's Motion, at 2). This is because, in her view, Mr. Moberly – on whose motion proceedings were expedited – no longer possesses any right to participate in the instant

proceedings.<sup>2</sup> Of course, the Court has already answered this question. Prior to briefing, Appellant went to some effort to exclude Mr. Moberly from these proceedings, and her efforts to that end were rebuffed by the Court. See Vet.App. Docket No. 15-3191 (June 13, 2016, Order). Although the Court has since spoken to that issue anew, in that it issued a decision from the bench after argument that the Secretary may not seek to recoup any funds from Mr. Moberly, regardless of whether Appellant is found to be entitled to the funds that she received, that does not have a present impact upon Mr. Moberly's continued right to participate in these proceedings. In this regard, Appellant forgets that, until the Court's decision, in whatever respect, becomes final, Mr. Moberly's interest in the instant proceedings remains extant. See Vet.App. Rules 36, 41.

Ultimately, what Appellant appears to seek here with her motion is to press a sort of reset button. She seeks to relitigate the question of whether Mr. Moberly may participate in these proceedings. She seeks the Court's reconsideration of its order to expedite proceedings. And, she seeks to reopen

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<sup>2</sup> In this regard, the Secretary notes that Appellant does not indicate that she has sought Mr. Moberly's position with respect to her motion. This would seem to be a product of her insistence that he has no right to continued participation in these proceedings. Her view notwithstanding, the Court's order granting Mr. Moberly the status of an intervenor remains in effect. Insofar as the relief sought by Appellant's motion impacts Mr. Moberly, the undersigned contacted his counsel on October 5, 2016, to ensure that he appreciated the potential impact of the instant motion. He indicated that he does indeed understand this potential impact, and he further indicated that, although he does not presently intend to respond to Appellant's motion, he nonetheless reserves the right to respond to Appellant's proposed supplemental brief, in the event that it is accepted by the Court.

the discussion of the issues that have already been the topic of extensive discussion by her, as well as the other parties. Put most simply, the issues that Appellant wishes to brief have been discussed. The parties understood them. The Court understood them, and it provided all the parties with a full and fair opportunity to discuss them. Although Appellant may, for reasons that are her own, feel that she should be granted a mulligan here, she has given the Court no reason to indulge her request.

**WHEREFORE**, the Secretary respectfully opposes Appellant's motion for leave to reopen briefing in the instant matter and submits that the Court should deny that motion and proceed to a decision in due course.

Respectfully submitted,

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